Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

CARL PEASE,
Petitioner

v.

YELLOWSTONE COUNTY, a political subdividion of the State of Montana
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a tribal court have jurisdiction to enter a declaratory judgment against a county concerning taxation of land on an Indian reservation owned in fee by a member of the tribe?

PARTIES TO THE PROCEEDINGS

There are no parties other than the petitioner and respondent identified in the caption of this matter.

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PETITION FOR A WRIT OF CERTIORARI

Carl Pease respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a -19a) is reported at 96 F.3d 1169. The opinion of the district court (App. B, *infra*, 20a-27a) is unreported. The opinion of the Crow Court of Appeals (App. C, *infra*, 28a-34a) is reported at 21 Ind. Law Rep. 6109. The

memorandum of the tribal trial court (App. D, 35a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1996. A petition for a rehearing was denied October 25, 1996. (App. E, *infra,* 40a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents an issue of federal common law. No specific constitutional or statutory provisions are involved.

STATEMENT

Pease, a member of the Crow Tribe, owns 80 acres in fee simple on the Crow Indian Reservation. Pease obtained the land from his father, George Pease, the original allottee, by means of an *inter vivos* transfer. George Pease had been issued a fee patent despite the fact that he had never requested that the land be removed from trust. Carl Pease brought an action in the Crow Tribal Court seeking declaratory and injunctive relief against Yellowstone County to prohibit future taxation or sale of the land for delinquent taxes. No monetary relief

was sought.

In the tribal court the parties stipulated to the entry of a preliminary injunction and a stay of the matter pending the decision of this Court in *Yakima Indian Nation v. Yakima County*, 502 U.S. 251 (1992). After the *Yakima* decision, the parties moved to lift the stay and the tribal court lifted the stay shortly after the Ninth Circuit's decision in *Lummi Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993). The parties then stipulated to the facts and submitted the matter to the tribal trial court on cross motions for summary judgment.

The tribal trial court held that the state constitution barred Montana from imposing taxes on Pease's land. App. D, *infra*. The County appealed that judgment to the tribal appellate court. The county raised the issue of tribal jurisdiction for the first time in its reply brief on appeal. The Crow Court of Appeals found it had jurisdiction and held Pease's land was not taxable as a matter of federal law. App. C, *infra*. The County then filed an action in the federal district court seeking a declaration that County could tax the land and that the Crow Tribe lacked jurisdiction over the matter. The district court based its jurisdiction upon 28 U.S.C. § 1331, federal question jurisdiction. The district court entered a memorandum order granting the County summary judgment on the issue of the Tribe's jurisdiction, but did not rule on the merits of the underlying tax issue. App. B, *infra*. Pease appealed that judgment to the Ninth Circuit which affirmed the district

court, holding the tribe lacked sufficient interest in the dispute to assert jurisdiction over the matter. App. A, *infra*.

REASONS TO GRANT PETITION

I. THIS COURT SHOULD GRANT, VACATE AND REMAND IN LIGHT OF *A-1 CONTRACTORS*.

This case deals with the jurisdiction of an Indian tribe over non-Indians in actions arising on reservation. In the decision below, the Ninth Circuit relied extensively on the Eighth Circuit decision in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (en banc). *See*, Appendix A at 13a-15a. After the Ninth Circuit decision in this case, this Court granted certiorari in *Strate v. A-1 Contractors*, 117 S.Ct. 37 (1996)(No. 96-1872).

Both the Eighth Circuit in *A-1 Contractors* and the Ninth Circuit in the opinion below noted some "tension" between the decisions of this Court in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 10 (1987) and *Montana v. United States*, 450 U.S. 544 (1981). *See, A-1 Contractors* at 76 F.3d 938-39, *Yellowstone County v. Pease*, *infra*, at 14a-15a. It is likely that *A-1 Contractors* will shed light on this "tension" and the general issue of tribal jurisdiction over non-Indians.

If *A-1 Contractors* is reversed then a "grant, vacate and remand" in this matter would allow the Ninth Circuit to determine if the matter falls within the scope of tribal jurisdiction recognized in *A-1 Contractors*.

Even if *A-1 Contractors* is affirmed, the Ninth Circuit should be given the opportunity to determine if any part of the holding in *A-1 Contractors* would change the position taken by the panel below. For example, this Court could affirm *A-1 Contractors* on the narrow ground that all parties are non-Indian but imply that tribal jurisdiction exists when one party is a tribal member, as is the case here. Tribal jurisdiction in this case might also be greater since this action involves land owned by a tribal member while *A-1 Contractors* involves a tort on a state highway. Whether *A-1 Contractors* is reversed or affirmed, it would be appropriate to grant the petition for certiorari, vacate the decision below and remand for further proceedings consistent with the decision of this Court in *A-1 Contractors*.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully Submitted,

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JANUARY 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36026

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff-Appellee,

v.

CARL PEASE,
Defendant-Appellant.

[Filed September 11, 1996]

Before: Eugene A. Wright, Robert R. Beezer and Diarmuid F. O'Scannlain, Circuit Judges.

OPINION

O'Scannlain, Circuit Judge:

We must decide whether an Indian tribal court has subject matter jurisdiction to entertain an action challenging a county's right to impose property taxes on

reservation land held in fee by a member of the tribe.

I

Carl Pease, a member of the Crow Tribe of Indians ("the Tribe") in Montana, appeals from the district court's summary judgment for Yellowstone County (the "County") in the County's action seeking a declaratory judgment that the Crow Tribal Court exceeded its jurisdiction by ruling that Pease was not required to pay property taxes imposed by the County. Pease owns fee title to real property located within the boundaries of the Crow Reservation. The property was allotted and patented in fee to Pease's father under the Crow Allotment Act of 1920, 41 Stat. 750.[1] Pease has failed to pay his state property taxes from 1987 to the present. In July 1991, he filed an action in Crow Tribal Court seeking to enjoin Yellowstone County from imposing state property taxes on his land. The parties agreed to stay the tribal court action pending the Supreme Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 112 S. Ct. 683 (1992) (holding that states could impose an ad valorem property tax on fee land that had been allotted under the General Allotment Act). After the Court decided *Yakima,* the tribal court lifted the stay. The parties stipulated to the facts and submitted cross motions for summary judgment.

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[1]"Patented in fee" refers to Indian land held in fee by an individual Indian, as opposed to land held in trust for the tribe by the federal government. Felix S. Cohen's Handbook of Federal Indian Law, 605-19 (Rennard Strickland et al. eds., 1982).

The tribal court concluded that Montana's Constitution bars the County from imposing taxes on Pease's land, and enjoined the County from issuing a tax deed or tax sale certificate. The County appealed to the Crow Court of Appeal, which held that the Crow tribal courts had jurisdiction of the case and that the County could not tax Pease's land because it was allotted under the Crow Allotment Act, not the General Allotment Act.

The County brought an action in federal district court seeking a declaration that the tribal court lacked jurisdiction over Pease's case and that the County could tax Pease's land. The County later withdrew its request for a declaration that the County could tax Pease's land.[2] Relying on *Montana v. United States*, 450 U.S. 544 (1981), the district court granted the County's motion for summary judgment, holding that tribal courts do not have jurisdiction over the subject matter of the case. *Yellowstone County v. Pease*, No. CV 94-131-BLG-JDS (D. Mont. July 26, 1995) (memorandum and order). The district court granted the County's unopposed motion for entry of final judgment, and entered judgment on September 13, 1995, thus vacating the tribal court decisions. Pease timely filed a notice of appeal.

II

As a threshold matter, we reject Pease's contentions

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[2]The County "believes Pease's defenses to his tax liability are properly resolved in state administrative and judicial proceedings." Accordingly, the district court did not reach the merits of the underlying tax issue.

that the district court (1) should have dismissed the County's action for failure to exhaust tribal remedies, and (2) abused its discretion in failing to conclude that the Crow Tribe is an indispensable party.

A

In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), the Supreme Court held that a party must exhaust tribal court remedies before a federal district court may entertain a challenge to tribal jurisdiction. *Id.* at 857; see *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("*National Farmers Union* requires that the issue of jurisdiction be resolved by the Tribal Courts in the first instance"). The Supreme Court concluded that the congressional policy of supporting tribal self-government "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers Union*, 471 U.S. at 856 (footnote omitted).

Although Pease concedes that "the [C]ounty exhausted tribal remedies," he contends that the County's failure to challenge tribal jurisdiction before filing its tribal appellate reply brief deprived the tribal court of a "full opportunity" to consider the jurisdictional issue and to develop a "full record." *See id.* at 856-57. The district court rejected Pease's contention, and concluded that the County exhausted its tribal remedies because "the Crow Court of Appeals ruled on its jurisdiction."

[1] Pease's contention lacks merit. As this court has stated: "Once all tribal remedies are exhausted and the

tribal courts finally decide that tribal jurisdiction exists, then the district court can decide the question of tribal jurisdiction." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1227 (9th Cir. 1989) (citing *National Farmers Union*, 471 U.S. at 852). Here, the tribal court clearly had a "full opportunity" to consider the jurisdictional issue because the Crow Court of Appeals actually and finally decided that tribal jurisdiction exists. Accordingly, the district court did not err in concluding that the County exhausted tribal court remedies.

B

We are also unpersuaded by Pease's contention that the district court abused its discretion by concluding that the "Crow Tribe is not an indispensable party, and [that] the Tribe would be bound by a judgment of this Court."

Under Federal Rule of Civil Procedure 19, a non-party is "indispensable" to an action if (1) the non-party is "necessary" under Rule 19(a); (2) the non-party cannot be joined (due to sovereign immunity, for example); and (3) the non-party's absence would mandate dismissal according to a weighing of the factors outlined in Rule 19(b). Because we conclude that the Tribe is not a necessary party, we need not advance to steps two and three.

This court undertakes a two-pronged analysis to determine whether a non-party is necessary under Rule

19(a).[3] If a non-party satisfies either of the two prongs, the non-party is necessary. First, we determine whether "complete relief" is possible among those already parties to the suit. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); see also *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500, 1501 (9th Cir. 1991) (O'Scannlain, J., concurring in part and dissenting in part) ("The relevant question for Rule 19(a) must be whether success in the litigation can afford the plaintiffs the relief for which they have prayed."). Second, we decide whether the non-party has a "legally protected interest in the suit." *Makah*, 910 F.2d at 558.

Pease contends that the County should have sued the Tribe or the tribal court because "it is the actions of the tribal court that the County seeks to void." Pease

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[3]Rule 19(a) describes persons to be joined if feasible:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

maintains that the County cannot obtain complete relief without joining the Tribe because the "Crow Tribe could continue to assert its jurisdiction and enforce the judgment of its court if it is not made a party to the action." Pease also contends that the Tribe has a legally protected interest in its "right to maintain a court system that can determine the rights of a tribal member and Yellowstone County to real property on the reservation."

Pease's contention that the district court's judgment is not binding on the Tribe is without merit for several reasons. First, the County's challenge to the tribal court's jurisdiction raises a federal question that is clearly within the jurisdiction of a federal district court. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) (citations omitted) ("[F]ederal courts are the final arbiters of federal law, and the question of tribal court jurisdiction is a federal question."), *cert. denied*, 499 U.S. 943 (1991); *see National Farmers Union*, 471 U.S. at 852. Second, it is not necessary to join the tribal court as a party to Pease's suit for the simple reason that tribal judges, like state judges, are expected to comply with binding pronouncements of the federal courts. *See, e.g., In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982) (citations omitted) ("it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion"); *James v. Jones*, 148 F.R.D. 196, 203 (W.D. Ky. 1993) (holding that state judges were not necessary parties to action challenging constitutionality of state laws relating to detention of juveniles). Accordingly, the district court

provided complete relief to the County for the purposes of Rule 19(a).

Pease's contention that the tribal court has a legally protected interest in maintaining a court system that adjudicates property rights is also without merit. First, this case is not about the Tribe's right to tax reservation lands; rather, this action arose from Pease's claim that the County, a political subdivision of the State of Montana, is powerless to tax his fee-patented property. Second, concluding that courts are necessary parties under Rule 19(a) whenever their jurisdiction is challenged would lead to absurd results. Clearly, the County can seek to have the judgment obtained by Pease vacated on jurisdictional grounds without naming the tribal court as a defendant. Third, unlike other cases where courts have concluded that tribes are necessary parties under Rule 19(a), here the Tribe cannot demonstrate that it is a party to a relevant commercial agreement, lease, trust, or treaty with one of the parties to the lawsuit.[4] Thus, the

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[4]*See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir. 1994) (governing tribe of reservation is necessary and indispensable party to suit challenging agency decision that fractional interests in trust property escheated to governing tribe under federal statute); *Confederated Tribes*, 928 F.2d at 1498 (Quinault Indian Nation is necessary and indispensable party to suit challenging the United States' continuing recognition of Quinault Indian Nation as the sole governing authority for the Quinault Indian Reservation); *Makah*, 910 F.2d at 558 (absent tribes holding treaty right to salmon are necessary parties to Makah's challenge to Department of Interior's inter-tribal fish allocation decision); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989)

tribal court does not have a legally protected interest that would be impaired or impeded by the County's suit.

[2] Accordingly, the district court did not err in holding that the Crow Tribe is not an indispensable party.

III

Relying upon *Montana*, 450 U.S. 544, the district court concluded that this action "involves an external relationship between the Tribe and non-members of the Tribe, the County. The Tribe's sovereignty concerning external relationships has been divested, and the Tribe is not free to determine independently the County's authority to tax fee patent land on the reservation." The district court further concluded that the Tribe could not assert jurisdiction under either of the two exceptions outlined in *Montana*.

[3] In *Montana*, the Supreme Court considered the power of an Indian tribe to regulate hunting and fishing by non- Indians on lands located within the Crow Reservation and owned in fee simple by non-Indians. The Court provided the following discussion of tribal sovereignty:

> [T]he Court [in *United States v. Wheeler*, 435 U.S.313 (1978)] was careful to note that, through their original incorporation

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(Indian tribe is necessary party to action seeking to enforce lease agreement signed by tribe); *see also Enterprise Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 893 (10th Cir. 1989) (Indian tribe is necessary party to action seeking to validate contract with tribe).

into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. The [Wheeler] Court distinguished between those inherent powers retained by the tribe and those divested:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 563-64 (citations and internal quotation marks omitted) (emphasis in original). The Court concluded:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Id. at 564 (citations omitted) (emphasis added); accord *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 425-28 (1989) (plurality opinion); *see also South Dakota v. Bourland*, 113 S. Ct. 2309, 2320 n.15 (1993) (quoting *Montana*, 450 U.S. at 564) ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' ").

[4] The *Montana* Court then went on to discuss two exceptions to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The first exception recognizes that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* (citations omitted). The second exception acknowledges a "tribe's

inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citations omitted).

A

Here, the district court rejected Pease's contention that the Tribe has jurisdiction under the first *Montana* exception on the ground that a consensual commercial relationship arose from the Crow Allotment Act of 1920 (which gave the state of Montana sections 16 and 36 of every range and township on the reservation). The district court concluded that the Crow Allotment Act "is a legislative directive from Congress and does not equate to a consensual commercial relationship." The district court also rejected Pease's assertion that tribal jurisdiction exists under the second *Montana* exception on the ground that the County's taxing activity affects the "political integrity, the economic security, or the health or welfare of the tribe." The court concluded that "while the state taxes affect the individual Pease, the taxes do not imperil the political integrity, economic security, or the health and welfare of the Crow Tribe."

B

[5] On appeal, Pease asserts that *Montana* does not apply to the County's action because *Montana* only imposed restriction on a tribe's jurisdiction over fee land owned by non- Indians. This contention is unpersuasive because the issue presented here is whether the tribal

court may assert jurisdiction over a non-Indian party (the County), and this court has called *Montana* "the leading case on tribal civil jurisdiction over non-Indians." *Shoshone-Bannock Tribes*, 905 F.2d at 1314; see also *A-1 Contractors v. Strate*, 76 F.3d 930, 937-38 (8th Cir. 1996) (en banc) (rejecting notion that *Montana* and its progeny are limited to cases involving fee lands owned by non-Indians), petition for cert. filed, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 95-1872).[5]

C

[6] Next, Pease contends that the district court erred by failing to recognize that post-*Montana* cases (e.g., *National Farmers Union* and *Iowa Mutual*) demonstrate that tribal adjudicatory jurisdiction over non-Indians is much broader than the tribal regulatory authority at issue in *Montana*.[6] We are not persuaded.

[7] Pease's assertion of a meaningful adjudicatory/regulatory distinction is unavailing, particularly in light of the Eighth Circuit's recent rejection of this argument

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[5]In A-1 Contractors, the court overturned tribal court jurisdiction in a tort action between non-Indians because the court could not find a consensual agreement under the first Montana exception, and because the "desire to assert and protect excessively claimed sovereignty" was not a sufficient tribal interest under the second exception. 76 F.3d at 940.

[6]The Crow Tribe also makes this argument in its amicus brief. The Tribe argues that the correct test, as set forth in National Farmers Union, "is whether tribal court jurisdiction has been divested by a specific treaty or statutory provision."

in a persuasive en banc opinion. *A-1 Contractors*, 76 F.3d at 938 ("[T]he distinction does not appear explicitly, or even implicitly, anywhere in the case law. *Montana* and the cases following *Montana* . . . never suggested that their reasoning is limited solely to regulatory matters."); *see also Brendale*, 492 U.S. at 430 ("The governing principle [of *Montana*] is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.").

In *Iowa Mutual*, the Court stated that civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. In *National Farmers Union*, the Court observed: "[T]he existence and extent of a tribal court's [civil subject-matter] jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S. at 855-56.

[8] In *A-1 Contractors*, the Eighth Circuit conceded that some of the language in *Iowa Mutual* and other cases "can be viewed in isolation to create a tension with *Montana*," but the court concluded that

> a careful reading of the particular language of those cases . . . indicates that they can and should be read together with *Montana*

> to establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

A-1 Contractors, 76 F.3d at 938-39. The Eighth Circuit also stressed that *Iowa Mutual* and *National Farmers Union* are exhaustion cases that did not decide whether tribes had jurisdiction over nonmembers. *Id.* at 936; *see also Brendale,* 492 U.S. at 427 n.10.

We reject Pease's contention that *A-1 Contractors* is erroneous and in conflict with *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir.), *cert. denied*, 115 S. Ct. 485 (1994). It is true that the Eighth Circuit declined to follow Hinshaw "[t]o the extent that Hinshaw supports the . . . arguments that tribal courts have jurisdiction over a tort claim arising between two non- Indians on a highway running through an Indian reservation." *A-1 Contractors*, 76 F.3d at 939. However, *Hinshaw* is consistent with *Montana* and in no way supports the Tribe's adjudicatory/regulatory distinction; moreover, *Hinshaw* is clearly distinguishable from the case before

us. [7]

In *Hinshaw*, this court upheld tribal court jurisdiction in a tort action (wrongful death) brought by a tribal member whose son (a non-member of the tribe) was killed by an automobile driven by a non-Indian resident of the reservation. Citing *Montana*, the court first determined that the Tribes retained their inherent jurisdiction over the alleged tort; the court rested this determination on tribal ordinances and state court decisions, which explicitly provide that the Tribes have concurrent jurisdiction with the states over automobile accidents on public roads on the reservation. Hinshaw, 42 F.3d at 1180. Thus, the *Hinshaw* court implicitly concluded that state and tribal authorities coupled with the tortfeasor's specific contacts with the reservation created the requisite "tribal interest" under *Montana*. In contrast, the Crow Tribe does not enjoy specific authority to exercise jurisdiction over the propriety of a county's property tax scheme; in addition, unlike the non-Indian tortfeasor in Hinshaw, the non-Indian here neither resided on the reservation nor violated an enforceable tribal ordinance.

We also reject Pease's suggestion that *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992), compels the

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[7]In fact, *Hinshaw* is also distinguishable from *A-1 Contractors*. Although the Eighth Circuit did not mention this distinction, the tribal court plaintiff in Hinshaw, unlike the tribal court plaintiff in *A-1 Contractors*, was a tribal member residing on the reservation. See *Hinshaw*, 42 F.3d at 1180.

conclusion that tribal courts may exercise jurisdiction over government entities in a wide variety of actions. In Plainbull, the United States brought suit (in its own right and on behalf of the Crow Tribe) against an Indian couple (the Plainbulls), alleging that they trespassed on tribal trust land and failed to comply with orders to pay annual grazing fees on the Crow reservation. Pursuant to 25 U.S.C. S 201, the United States brought the action against the Plainbulls in federal district court. Concluding that the action "essentially involves the enforcement of a tribal resolution against a tribal member," the district court granted the Plainbulls' motion to dismiss on abstention grounds. *Id.* at 725. On appeal, this court affirmed, holding that the district court's decision to abstain was not an abuse of discretion. *Id.* at 728 ("Because the Plainbulls [members of the Crow Tribe] grazed their cattle on tribal land without obtaining a tribal permit, the Government should have filed in the tribal court."). In short, this court in *Plainbull* relied upon the exhaustion doctrine (*National Farmers Union* and *Iowa Mutual*), and had no occasion to discuss the *Montana* test.

D

Finally, assuming arguendo that *Montana* controls, Pease argues that the district court erred in failing to conclude that Pease's action qualified under both factors. We disagree.

[9] First, we are not persuaded by Pease's contention that the Crow Allotment Act of 1920 gave rise to a commercial agreement that enables the Tribe to qualify

for jurisdiction under the first *Montana* exception. Pease stresses that the Allotment Act gave Montana sections 16 and 36 of every range and township on the reservation upon the condition that Montana would allow Crow children to attend state public schools. This contention fails because the Allotment Act does not constitute a consensual commercial agreement; in fact, "allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction." *Montana*, 450 U.S. at 559-560 n.9 (citations omitted). As the district court correctly concluded, the Allotment Act is "a legislative directive from Congress."

[10] Second, we reject Pease's argument that the Tribe has jurisdiction under the second *Montana* exception. Although he concedes that this action directly concerns only his particular property, he argues that the overall impact of the loss of land due to potential foreclosures could be devastating to the Tribe's land holdings and political integrity. This contention fails to establish a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe as a whole." *South Dakota v. Bourland,* 39 F.3d 868, 870 (8th Cir. 1994) (emphasis added); *see Montana*, 450 U.S. at 566. As the Supreme Court has stated, "[t]he impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Brendale*, 492 U.S. at 431. Pease's speculation concerning future foreclosures is

insufficient to constitute the requisite imperilment.[8]

IV

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the County.

AFFIRMED.

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[8]Because we affirm the district court's holding on the jurisdictional issue, we need not reach the County's sovereign immunity argument.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36026

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff-Appellee,

v.

CARL PEASE,
Defendant-Appellant.

[Filed October 25, 1996]

WRIGHT, BEEZER AND O'SCANNLAIN, Circuit Judges:

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BILLINGS DIVISION

No. CV 94-131-BLG-JDS

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff,
v.
CARL PEASE,
Defendant.

[Filed July 26, 1995]

MEMORANDUM AND ORDER

SHANSTROM, District Judge

Pending before the Court are cross-motions for summary judgment between plaintiff, Yellowstone County (County), and defendant, Carl Pease (Pease).

BACKGROUND

Pease is member of the Crow Tribe of Indians (Tribe) and owns property in fee located within the boundaries of the Crow Reservation. Pease has failed to pay his state property taxes from 1987 to the present. In July 1991, Pease filed an action in Crow Tribal Court seeking to enjoin the County from imposing state property taxes against his land. While in Tribal Court, the parties

agreed to stay the matter pending the decision of the United States Supreme Court in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 112 S.Ct. 683 (1992). That decision held the states could impose an ad valorem property tax on fee land that had been allotted under the General Allotment Act. The Tribal Court lifted the stay and, upon summary judgment motions, held the Montana state constitution barred the County from imposing taxes on Pease's land. The County appealed that judgment to the Crow Court of Appeals, which held the Crow tribal courts had jurisdiction over the case and held the County could not tax Pease's land because the land was allotted under the Crow Allotment Act, not the General Allotment Act.

STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Cord. v. Catrett*, 477 U.S. 317, 322 (1986). The parties agree to the underlying facts and argue the interpretation of law.

DISCUSSION

In its complaint before this Court, the County raised two issues. First, whether the tribal courts had subject matter jurisdiction, and second, whether the County has authority to tax Pease's property. In the present motion for summary judgment, the County seeks resolution of only the first issue concerning the jurisdiction of the

tribal courts.

I. Tribal Court jurisdiction

The leading United States Supreme Court case on tribal court jurisdiction over non-Indians is *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981). The Supreme Court stated:

> (T)hrough their original incorporation into the United States as well as through specific treaties and statues, the Indian tribes have lost many of the attributes of sovereignty . . .
>
> The areas in wh ch such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe* . . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relation among members of a tribe*. Thus they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.
>
> Thus in addition to the power to punish tribal offenders, the Indian tribes retain

> their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise or tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.
>
> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 563-66 (emphasis in original) (citations omitted). From the foregoing, the law states there has been a divestiture of tribal sovereignty in areas

involving relations between a tribe and non-members of the tribe. *Id*. at 564. Tribes do not have independent freedom to determine their external relations. *Id*. The *Montana* decision, however, recognizes two exceptions. First, tribes retain power to exercise some forms of civil jurisdiction when non-members enter consensual relationships with the tribe or its members. *Id*. at 565. Second, tribes retain civil authority when a non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Id*. at 566.

This case involves an external relationship between the Tribe and non-members of the Tribe, the County. The Tribe's sovereignty concerning external relationships has been divested, and the Tribe is not free to determine independently the County's authority to tax fee patent land on the reservation.

Pease argues the Tribe has jurisdiction under the first *Montana* exception in that a consensual commercial relationship arises from the Crow Allotment Act of 1920, which gave the state of Montana sections 16 and 36 of every range and township on the reservation. Apparently the land was given to the state as compensation for the lack of a tax base to support state schools which would be required to educate Crow children.

The Crow Allotment Act of 1920 does not form a consensual commercial relationship between the parties. That Act is a legislative directive from Congress and does not equate to a consensual commercial relationship.

Pease argues the Tribe has jurisdiction under the

second *Montana* exception because the County's action effects the "political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The proper focus of this test is the effect upon the Tribe as a whole, not the effect upon individual tribal members. *See, South Dakota v. Bourland*, 39 F.3d 868, 870 and n.5 (8th Cir.1994); *Lewis County Idaho v. John Allen*, Civil No. 93-0382-N-HLR (D.Idaho 1994). Furthermore, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the U.S. Supreme Court discussed the second *Montana* exception, and noted not all conduct that threatens or effects a tribe will trigger tribal authority. Rather, the impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe. *Id.* at 431 (emphasis added).

Pease argues that while the loss of one or two allotments may seem insignificant, the cumulative loss of land through the allotment process has had a devastating economic impact on the tribes. Pease's argument goes too far. The allotment process was a complex U.S. government policy carried out by various pieces of legislation including the Crow Allotment Act of 1920. The Court finds that while the state taxes affect the individual Pease, the taxes do not imperil the political integrity, economic security, or the health and welfare of the Crow Tribe.

Furthermore, the issue of whether a state or county can

tax land on a reservation has been extensively litigated in federal court. *See, County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 112 S.Ct. 683 (1992); *Lummi Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir.1993); *Goudy v. Meath*, 203 U.S. 146 (1906). Considering the extensive history of federal litigation on the merits of this case, it is incomprehensible to now conclude the tribal courts have jurisdiction.

Pease argues the County has failed to exhaust tribal remedies. Since the Crow Court of Appeals ruled on its jurisdiction, this Court finds the County has exhausted their tribal remedies.

Pease argues the Crow Tribe is an indispensable party because if the Tribe is not a party, then it will not be bound by a judgment of this court. The Crow Tribe is not an indispensable party, and the Tribe would be bound by a judgment of this Court.

II. The merits - can the County tax Pease's land?

In the cross-motions for summary judgment, the parties have not addressed the merits, namely, does the County have the authority to tax Pease's land. Having determined the federal courts are the proper forum to determine the tax issue, the Court will give Pease 60 days from the date of this order to bring a summary judgment motion on the merits. If Pease chooses not to move for summary judgment, the Court will dismiss this case with prejudice with a holding the tribal courts do not have jurisdiction over the subject matter, thus vacating the tribal courts' judgments.

Accordingly,

IT IS ORDERED

1. The County's motion for summary judgment is granted to the extent that the tribal courts do not have jurisdiction over the subject matter in this case.

2. Pease's motion for summary judgment is denied.

3. Pease has 60 days from the making of this order to move for summary judgment on the question of whether the County can tax Pease's land. Failure to move for summary judgment will prompt the Court to enter judgment with prejudice in favor of the County, thus vacating the tribal courts' judgments.

The Clerk of Court shall forthwith notify the parties of the making of this order.

APPENDIX C

CROW TRIBAL COURT OF APPEALS
In and for the Crow Tribe of Indians
Crow Agency, Montana 59022

CARL PEASE,
Plaintiff/Appellee.

vs.

YELLOWSTONE COUNTY,
Defendant/Appellant

APPELLATE OPINION

[Filed June 24, 1994]

Before St. Clair, Gardipee, and Lozar, Special Crow Tribal Appeals Judges

Appellant, Yellowstone County, appealed the judgment of the Crow Tribal Court dated March 25, 1994, holding that Yellowstone County is without authority to tax real property owned by Carl Pease, a member of the Crow Tribe of Indians located on the Crow Indian Reservation,

more particularly described as,

E 1/2 NW 1/4 Section 24, T1S, R26E,
M.P.M., Yellowstone County, Montana.

Yellowstone County contends that fee patented reservation land is taxable by Yellowstone County once restraints against alienation are removed. We disagree.

In July 1991 an action was filed in the Crow Tribal Court by Carl Pease, present owner of the land in question. He obtained it from his father Carl Pease, Jr., who received a fee patent July 26, 1923. Carl Pease failed to pay his ad valorem taxes on the land from 1987 to present. Yellowstone County attempted to issue a tax deed, but this action was filed and the tribal court enjoined Yellowstone County from receiving a tax deed to the property. Yellowstone County appealed the injunction and also raised the lack of subject matter jurisdiction for the first time.

The trial court in this case on stipulated facts concluded that the land owned by Carl Pease is not taxable by Yellowstone County because no record shows that Carl Pease, Jr. ever requested a fee patent and that states so not have the right to tax land to which a fee patent was issued without the consent of the beneficial owner. In addition, the court concluded that the land is not taxable because the state has not acted by specific legislation to remove restrictions in its enabling legislation to accept tax jurisdiction.

Appellant claims, for the first tine on appeal, that the Crow Tribal Court does not have jurisdiction over this matter and cites *National Farmers Union v. Crow Tribe,*

471 U.S. 845, 852 (1988), for the proposition that a careful examination must be made as to the extent tribal sovereignty has been altered, divested or diminished. It asserts that this requires the Crow Tribal Court to consider the examination of subject matter jurisdiction over cases involving non-Indians in the light of its ability to regulate the underlying transaction. It goes on to argue that *National Farmers Union* read together with *Iowa Mutual Insurance v. LaPlante*, 480 U.S. 9, 16 (1987) implies that tribal law may not extend to situations involving non-Indians. It states in its Reply Brief at page 4:

> The Tribal Court does not have the ability to decide what land within the borders of the State of Montana should be subject to tax. State taxation law should be interpreted by other courts.

Yellowstone County assumes, without presenting any facts to support it, the conclusion that the Crow Tribal Court simply because it is a tribal court, does not have the ability to decide what land on the Crow Reservation should or should not be taxable but that this should be interpreted by other courts. This argument is without merit. A careful examination of the extent that tribal sovereignty has been altered divested or diminished as to the issue of state taxation on land located within the Crow Indian Reservation reveals that no diminishment, divestiture or alteration is alleged to have occurred. To the contrary, the Crow Tribal Code, Title III, Ch. 2, Sec. 20, explicitly provides for subject matter jurisdiction over this kind of case.

The crux of appellant's argument involves three steps. First, a state cannot tax reservation land unless Congress authorized it and has made its intention unmistakenly clear, *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985). Second, *Yakima Indian Nation v. Yakima County*, 112 S.Ct. 683 (1992), found such clarity in the General Allotment Act, 24 Stat. 388, sections on alienability and a proviso in the Burke Act of 1906, 34 Stat. 182. Third, *Yakima Indian Nation, Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir.1993), and *Blackfeet Tribe v. Robinson*, No. CV-89-100 G.F. (1994), hold that alienable land will be taxable regardless of how the parcel was allotted. Thus following this logic, land allotted even under the Crow Allotment Act, 41 Stat. 751, Act of June 4, 1920, is taxable by Yellowstone County.

This interpretation misses the point that there must be a finding of unmistaken clear intent of Congress to allow taxation on these particular lands, lands which were not patented under the General Allotment Act as in *Yakima Indian Nation*, nor under treaty as in *Lummi*, nor under townsite laws as in *Blackfeet Tribe*. There is an appealing simplicity to the proposition that alienable land is taxable land. However, federal Indian law is not simple, especially where many tribes have legislation that pertains only to that tribe, such as the Crow Allotment Act here.

We conclude that allotments made under the Crow Allotment Act are not governed by the General Allotment

Act. Further, Congress has not made its intention unmistakenly clear that the land should be taxed under the Crow Allotment Act of 1920. Therefore, no error of law exists because this case is distinguishable from *Yakima Indian Nation* where the United States Supreme Court ruled that Congress' intent was unmistakenly clear that land patented under the General Allotment Act should be taxed. This land does not fall under a treaty as in *Lummi*, nor townsite laws as in *Blackfeet Tribe*.

Utilizing a strained interpretation to read a clear manifestation of Congressional intent to remove the restrictions on real property taxation, the United States Supreme Court in *Yakima Indian Nation*, implied intent from Section 5 of the General Allotment Act read along with the proviso in the Burke Act of 1906. This analysis was not made in *Lummi* and *Blackfeet Tribe*; these cases merely extend the reasoning that alienability equals taxability. This overreaching uses a blanket approach toward all tribes and does not scrutinize the Crow Allotment Act. in order to conclude that Congress clearly intended to remove the tax restrictions on this particular tract. What does appellant point to to indicate a manifestation of clear Congressional intent? What sections of the Crow Allotment Act indicate this and if they do were they complied with? Appellant believes that these cases hold that alienability to mean taxability on the Crow Indian Reservation. from an implication of intent made in Section 5 of the General Allotment Act of 1887 and a proviso in the Burke Act of 1906, and it doesn't matter how the land became patented.

To rule in Appellant's favor would require this court to ignore a tradition of independence that has historically existed between the Crow people and the United States Government. It would also require ignoring a policy of self determination observed by Congress and the President since 1968 and ignoring the amending of P.L. 280 to require consent of the Indian Tribes prior to any assuming of state jurisdiction. It would require applying the principles of assimilation repudiated by the policy of self determination. and the repeal of the allotment process that occurred in 1934.

The Ninth Circuit Court of Appeals in *Lummi* was a divided court and the dissent indicated that a clear manifestation of intent should not be implied in Indian law as appellant is asking this court to do. It stated:

> We need to find unmistakenly clear intent of Congress to allow taxation on these particular lands, lands which do not come under the GAA [General Allotment Act]. 5 F.3d 1355 at 1360.

In *Blackfeet Tribe*, the Federal District Court found alienability of allotments located in townsites of the state located on the Blackfeet Indian Reservation. Land located in a townsite is in a much different situation than land located on a portion of a reservation never under state authority as a townsite is. It can be argued that allotments in a townsite should not be restricted as to taxability just because of being located in a town that is incorporated as part of the State of Montana. We hold that absent an explicit Congressional manifestation of

intent to allow Yellowstone County to tax land within the Crow Indian Reservation, Yellowstone County lacks authority to tax this land and we affirm the ruling of the court below.

AFFIRMED

Judge Lozar dissents from this decision and files a separate opinion.

APPENDIX E

CROW TRIBAL COURT
IN AND FOR THE CROW TRIBE OF INDIANS
CROW AGENCY, MONTANA 59022

Civil No. 91-209

CARL PEASE,
Plaintiff/Appellee.

vs.

YELLOWSTONE COUNTY,
Defendant/Appellant

[filed March 25, 1994]

JUDGMENT AND MEMORANDUM

ARNESON, Tribal Judge

This matter was submitted on Stipulated Facts and Cross Motion for Summary Judgment. At issue is the ability of Yellowstone County to tax allotted patent land owned by a member of the Crow Tribe and located on the Crow Reservation. For reasons discussed below:

IT IS ORDERED ADJUDGED AND DECREED that Yellowstone County is without authority to tax the real property owned by Carl Pease more particularly

described as,

E1/2 NW1/4, Section 24, T 1S, R 26E, M.P.M.
Yellowstone County, Montana

It is further ordered that yellowstone County is enjoined from issuing a tax deed or tax sale certificate to the above described land.

MEMORANDUM

Plaintiff forwards two (2) reasons to find that his land is not subject to state taxation. First, he contends that federal law precludes taxation. Second, he maintains there are State statutory barriers.

I. The Federal Issue

The plaintiff puts forth an argument that almost persuades this court the land is not taxable by the state. In 1882 this Tribe negotiated a land cession with the United States. As part of the compensation for the ceded lands, the United States agreed to allot lands to individual members. These allotments were to be nontaxable for a minimum of 25 years and until such time thereafter until the President saw fit to remove the restriction. A tax exemption is a valuable property right and was part of the basis of the bargain. The land in question was patented directly into fee when allotted and was never tax exempt. While an individual may waive the benefits of tax exemption, it has been stipulated here that George Pease Jr. never requested a fee patent. This court is tempted to rule that his land is not taxable since the

president has never removed the restriction on taxation.[1] However, the court does not feel comfortable distinguishing *Lummi Tribe V. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), despite the fact that the Ninth Circuit did not address the contractual property right in that case.

II. The State Law Issue

The Montana Constitution disclaims all jurisdiction over Indian owned lands until it is given consent to exercise jurisdiction by the United States and the jurisdiction is accepted by the people of Montana (Art. I of Montana Constitution.) The consent of both sovereigns are needed.

The United States has consented to the state's exercise of taxing jurisdiction. *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, ____ U.S. ____, 116 L.Ed.2d 687 (1992); *Lummi Tribe V. Whatcom*

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[1]The court is aware of intervening allotment acts, specifically the General Allotment Act, 34 Stat. 182, and Crow Allotment Act of 1920, 41 Stat. 751.The court would read these acts together to find no repeal by implication of the tax exempt status. The court also notes that to the extent that the tax exempt status was a contractual property right, that right could not be taken by legislation without just compensation.

County, 5 F.3d 1355 (9th Cir. 1993).[2]

The consent of the second sovereign, Montana's consent, has not been met. The county failed to cite any statute or other authority showing that Montana has accepted jurisdiction over fee lands on an Indian Reservation.

Under the circumstances, plaintiff's land is not subject to state taxation until the state acts to accept such jurisdiction.

The court is aware that the state has asserted taxing authority since the land was first patented in fee. However, acting 70 years without authority does not confer a future right to act without authority.

In one way this court feel uncomfortable basing a decision on state law. Such a question should be decided by a state court.

While the State Court has upheld state taxation challenged under federal law authorities, has never addressed the need for the consent of the people of Montana.

In another way, this court believes a decision on the state law grounds is the most appropriate. The state can attempt to make the land taxable by passing

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[2]While the court is uncomfortable holding and does not hold that *Lummi* denies property rights granted by specific legislation, it is clear that absent specific legislation, the consent of the United 'States can be inferred from making land alienable.

appropriate legislation. This decision leaves that option open while a decision based on the federal issue would not. The court feels better leaving that option open, realizing that the State and Tribe might well negotiate a taxation compact that would prevent future litigation on the issue.

APPENDIX E
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36026

YELLOWSTONE COUNTY, a political subdivision of the State of Montana,
Plaintiff-Appellee,

v.

CARL PEASE,
Defendant-Appellant.

[Filed October 25, 1996]

WRIGHT, BEEZER AND O'SCANNLAIN, Circuit Judges:

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.